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No. 79-1940

In the Supreme Court of the United States

OCTOBER TERM, 1979

U.S. CABLEVISION CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably concluded that the union's designation, on a form provided by the Board, of an employee who had not authorized the union to designate him as an observer did not warrant setting aside the representation election.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 5

Conclusion 7

TABLE OF AUTHORITIES

Cases:

NLRB v. *Hale Manufacturing Co.*, 602 F.2d 244 6

NLRB v. *Mattison Machine Works*, 365 U.S. 123 6

Polymers, Inc. v. *NLRB*, 414 F.2d 999, cert. denied, 396 U.S. 1010 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 6

Statute and rule:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(a), 29 U.S.C. 158(a) 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 5

Section 8(a)(5), 29 U.S.C. 158(a)(5) 5

Section 9(a), 29 U.S.C. 159(a) 1

29 C.F.R. 102.69(a) 6

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 614 F.2d 341. The decision and order of the National Labor Relations Board (Pet. Supp. App. 1-11) are reported at 240 N.L.R.B. No. 23. The Regional Director's denial of election objections and certification of representation are set forth at A. 8-17.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1980, and a petition for rehearing en banc was denied on April 8, 1980 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on June 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are:

> Section 8(a), 29 U.S.C. 158(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Section 9(a), 29 U.S.C. 159(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit

[1] "A." refers to the appendix in the court below. A copy has been lodged with the Clerk of this Court.

appropriate for such purposes shall be exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

The Union[2] won a representation election in a unit of petitioner's employees by a vote of 11 to 10 on February 9, 1978 (A. 4, 8). Petitioner ("the Company") filed objections to the conduct of the election, alleging that the Union interfered with the employer's freedom of choice by designating as an election observer, on a form provided by the Board, an employee who had not authorized such designation (A. 5-7). The facts concerning this allegation are as follows:

By letter dated January 26, 1978, the Board's Regional Office mailed to both the Company and the Union a letter regarding the designation of election observers, together with a Board form for designation of observers and a form listing instructions for observer conduct during the election (A. 11, 64). On February 1, the Union's president filled out the observer designation form, listing one non-supervisory unit employee as the Union's chief observer and two other employees as additional observers (A. 11, 65). The designation form was signed by the Union president, with the Union's name handwritten directly above his (*ibid.*). The Union's president mailed copies of the observer designation form, the printed instructions for observers, and the Region's January 26 letter to each of the designated observers (A. 11, 65, 66).

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[2]Local 320, International Brotherhood of Electrical Workers, AFL-CIO, CLC.

One of the three employees designated by the Union, Gary Rose, had not authorized the Union to designate him as an observer and was upset by his designation because he had previously expressed the opinion that the Company's employees had no need for union representation (A. 11-12). In the remaining days preceding the election, Rose discussed his designation as a union observer with other unit employees and with certain management representatives (A. 12). As a result of a pre-election agreement that each party would be represented by a single observer, Rose did not serve as an observer during the election (A. 13).

In its objections to the conduct of the election, the Company asserted that the Union's designation of Rose as its election observer improperly forced Rose into publicly announcing to the Company his opposition to the Union just before the election; interfered with the unit employees' ability to freely express their choice at the polls by misrepresenting Rose's position on union representation; and constituted a misuse of the Board's election mechanism since the alleged misrepresentation was conveyed on a Board document (A. 10).

The Regional Director rejected the Company's contentions (A. 13-17), and the Board adopted her recommendation and certified the Union (A. 23). With respect to the Company's allegations of coercion of Rose and interference with the free choice of the unit employees, the Regional Director explained (A. 14-15; footnotes omitted):

> The Employer has furnished no evidence to show that agents of the [Union] had any knowledge of Rose's feelings or that they bore any malice toward him in connection therewith. In a similar vein, there is no indication that the [Union's] agents engaged in any conduct, independent of the designation of Rose

> as an observer, which could be construed as coercive, insofar as it might relate to Rose. With respect to the designation itself, I note in particular that the Board documents sent to Rose were also sent to Dunay and Malouf [the other observers designated by the Union]. The [Union] did not send them to any other unit employees nor did it seek to "make public" its designation of Rose in any other manner. In these circumstances, the fact that Rose felt compelled to discuss the matter with other unit employees and with certain of the Employer's representatives cannot fairly be held to constitute coercion attributable to the [Union], especially as Rose did so without ever informing the [Union] of his objection to having been selected. For the same reasons, even assuming *arguendo* that Rose's fellow employees *were* somehow influenced by the knowledge of Rose's selection as an observer for the [Union], this would not constitute sufficient grounds for setting aside the election.

With respect to the alleged misuse of Board election processes, the Regional Director explained (A. 16-17; footnote omitted):

> Clearly, in the instant case, there can be no suggestion that the Board's neutrality has been called into question. Nor can it even be said that the [Union's] conduct gave rise to the appearance that the Board has participated in the selection of Rose as an observer for the [Union]. The regional office letter which the [Union] included in the packet of materials it sent to Rose showed clearly on its face that it had been sent to representatives of both parties. Throughout the letter, the instructions relating to observers referred to such individuals repeatedly as "your observers." Similarly, Form R-34, containing

> the actual designations, states in pertinent part: "The *undersigned hereby designates* the following NON-SUPERVISORY employees . . . to act as Observers during the hours of balloting" (emphasis added). The form was signed by Frank Maher [the Union President] and showed the name of the [Union] just above the signature in Maher's handwriting. Finally, the instruction sheet (Form NLRB-722) contains general instructions regarding the conduct and responsibilities of all observers and makes no reference to any particular party. The documents were not altered in any way nor did they contain any misrepresentation of Board law or processes. Moreover, as noted above, in view of the fact that the [Union] sent the forms only to the three individuals it had designated as observers, and not to any of the other eligible voters, it would appear to be unwarranted to conclude that the [Union] indeed sought to use Board documents to gain any type of partisan advantage in the election campaign. On the basis of the foregoing, then, there could have been no confusion as to the fact that it was the [Union], and not the Board, which had selected Rose as [the Union's] observer.

Following certification of the Union, the Company refused to bargain, and the Board, on summary judgment, found the Company's refusal to bargain violative of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. Supp. App. 1-9). Accordingly, the Board ordered the Company to bargain with the Union (Pet. Supp. App. 10-11). The court of appeals enforced the Board's order (Pet. App. 1a-3a).

ARGUMENT

The Company does not challenge the Board's established policy, upheld by the courts, that a party seeking to

overturn a Board election must show not only that improprieties occurred, but also that they interfered with employee free choice to such an extent as to have materially affected the election results. *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Polymers, Inc.* v. *NLRB*, 414 F.2d 999, 1001 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970). Rather, the issue here is whether the Board abused its discretion in concluding that the Union's designation of an unwilling employee[3] as an election observer did not coerce the unwilling employee, and did not interfere with the other employees' freedom of choice or involve a misuse of Board processes. This issue, which turns on an evaluation of the particular circumstances of this case, does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In any event, for the reasons set forth in detail in the Regional Director's report on objections (see pages 3-5, *supra*), the Board's conclusion was clearly reasonable.

Furthermore, we note that the Company does not dispute the well-settled proposition that a party is entitled to a hearing on its objections only if it shows the existence of substantial and material factual issues which, if resolved in its favor, would require the setting aside of the election. *NLRB* v. *Hale Manufacturing Co.*, 602 F.2d 244, 248 (2d Cir. 1979). Rather, the Company merely contends that it has met that test here. However, the court below

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[3]The Regional Director pointed out (A. 13-14) that the pertinent Board regulations do not require that a party's designation of an individual as an election observer be conditioned upon the authorization or consent of that individual. Rather, the Board's Rules and Regulations state only that "[a]ny party may be represented [at the election] by observers of his own selection * * *." 29 C.F.R. 102.69(a). Thus, the Regional Director noted, the only restriction that the Board generally places on a party's ability to select observers is that the observers must be non-supervisory employees not otherwise identified with management (A. 14).

correctly concluded (Pet. App. 3a) that in the circumstances presented here the Company was not entitled to a hearing because, even if all of its factual allegations were accepted as true, they were not sufficient to warrant setting aside the election.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]There is no substance to the Company's contention (Pet. 8) that the court of appeals applied an erroneous legal standard in determining the Company's right to a hearing. The court of appeals stated that "[i]n short, we cannot say that there are any issues surrounding the designation of the unwilling employee as an observer 'that would require the setting aside of the representation election,' * * * if resolved in Cablevision's favor. Accordingly, the election will not be set aside and no hearing is required" (Pet. App. 3a, 4a; citation omitted).